(4)

No. 88-18

In the Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF NEW HAVEN, CONNECTICUT, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may take an interlocutory appeal from an order vacating the United States Army Corps of Engineers' denial of a fill permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and remanding the case to the Corps of Engineers for further proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-23a) is reported at 841 F.2d 440. The opinion of the district court (Pet. App. 25a-84a) is reported at 672 F.Supp. 561.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a) was entered on March 11, 1988. The petition for rehearing and suggestion for rehearing en banc were denied on April 7, 1988 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Mall Properties, Inc. (Mall Properties), a developer of shopping malls, "for many years has sought to develop a shopping mall in the Town of North Haven, Connecti-

cut" (Pet. App. 26a). Mall Properties proposed to build its project, a two-story shopping mall containing 1.1 million square feet, on a site along the eastern bank of the Quinnipiac River, roughly eight miles north of the City of New Haven (*id.* at 105a-108a). The project involved the filling of certain wetlands and open water. Accordingly, in November 1979, Mall Properties applied to the United States Army Corps of Engineers, under Section 404 of the Clean Water Act, 33 U.S.C. 1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, for a permit to fill those areas (Pet. App. 5a, 27a, 120a). Petitioner, the City of New Haven, vigorously opposed the proposed shopping mall on both environmental and economic grounds. Petitioner "claims that a North Haven mall will jeopardize the fragile economy of New Haven, which all levels of government have long been seeking to revitalize" (*id.* at 28a).

On August 20, 1985, the Corps of Engineers issued its "Record of Decision" denying Mall Properties' application for the permit (Pet. App. 104a-272a).[1] In determining that the application was "contrary to the public interest," the Corps of Engineers found that the project would have "troublesome" impacts on flooding and would cause a "net loss in wetland resources" (*id.* at 270a, 272a). Moreover, "weighing most heavily * * * [was the] concern for the socio-economic impacts this project would have on the

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[1] Apart from conducting public hearings and soliciting comments from interested parties, including various state and federal agencies, the Corps of Engineers prepared and considered an Environmental Impact Statement.

Colonel Carl B. Sciple, acting under the authority delegated by the Secretary of the Army and the Chief of Engineers, was responsible for reviewing Mall Properties' application (see 33 C.F.R. 325.8). Pet. App. 102a-103a.

City of New Haven" (*id.* at 270a).[2] Finally, the Corps of Engineers considered the opposition of the Governor of Connecticut, who in a July 1985 meeting with Colonel Sciple, "indicated that he felt it was not worth the risk to New Haven of building the North Haven mall" (*id.* at 272a).

2. On October 29, 1985, Mall Properties filed a complaint against the Secretary of the Army and the Corps of Engineers in the United States District Court for the District of Massachusetts. The complaint principally contended that the Corps of Engineers had exceeded its statutory authority in basing its decision on the project's impact on New Haven's economy and had violated its regulations by considering the Governor of Connecticut's opposition to the project without first giving Mall Proper-

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[2] The Record of Decision explained (Pet. App. 259a-261a):

> It is evident by visiting New Haven today, that an active, balanced retail core is one of the cornerstones of the city's deve[l]opment program and of downtown New Haven's future as a regional center. The city feels that the public-private partnership upon which the development program is built is strong and based upon a confidence in continued success of their overall economic development effort. Though this partnership program may be strong, the confidence upon which it is based is fragile, such that construction of the mall would seriously undermine the major retail element of their revitalization program. The spin-offs would extend beyond the potential store closings, it would effect [*sic*] the basic confidence in the future quality, vitality, and diversity of the downtown area affecting investments in housing, office and entertainment projects.
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> * * * It appears that New Haven's social and economic well being is tied directly to a viable retail environment reflecting a balanced racial and economic mix. The construction of the mall would disrupt this balance.
>
> * * * * *

ties an opportunity to respond.[3] Mall Properties sought an order vacating the order denying its permit. Pet. App. 6a-7a, 33a-34a.[4] Petitioner, under Fed. R. Civ. P. 24(a), moved to intervene as a defendant in the lawsuit; the district court granted the motion on May 12, 1986 (Pet. App. 85a-92a).

On cross-motions for summary judgment, the district court vacated the Corps of Engineers' denial of the permit and remanded the case for a reconsideration of Mall Properties' application (Pet. App. 25a-84a). The court concluded that "because the Corps gave significant weight to economic factors not related to changes in the physical environment in this case, its decision was not in accordance with Section 404 and Section 10" (*id.* at 63a-64a). The court also held that the Corps of Engineers had violated 33 C.F.R. 325.2(a)(3) by considering the comments of the

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[3] The applicable regulation, 33 C.F.R. 325.2(a)(3) (1986), provided in pertinent part:

> At the earliest practicable time, the applicant must be given the opportunity to furnish the district engineer his proposed resolution or rebuttal to all objections from other Government agencies and other substantive adverse comments before final decision will be made on the application.

That regulation has recently been amended and currently provides:

> If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer * * *. At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer.

Given the facts found by the district court, we doubt that the court would have reached a contrary result under the current regulation.

[4] Mall Properties had abandoned its effort to seek an order requiring the Corps of Engineers to issue the permit (Pet. App. 33a).

Governor of Connecticut without first notifying Mall Properties (Pet. App. 83a). The court therefore remanded the case to the Corps for reconsideration.

On September 14, 1987, petitioner filed a notice of appeal. The federal respondents, who had not filed a notice of appeal, moved to dismiss the appeal as interlocutory under 28 U.S.C. 1291. Mall Properties joined the federal respondents' motion. Pet. App. 5a.

3. The court of appeals dismissed petitioner's appeal, holding that the district court's order remanding the case to the Corps of Engineers was not a "final, immediately appealable order[ ]" (Pet. App. 10a). Relying on the general rule that orders remanding cases to administrative agencies are not immediately appealable under 28 U.S.C. 1291, the court of appeals stated that the district court's order "is but one interim step in the process towards [Mall Properties'] obtaining its ultimate goal," namely, the fill permit, and thus "the remand order [did not] meet[ ] the traditional definition of a final judgment, that is, one which 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' " (Pet. App. 8a (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)).

The court of appeals rejected petitioner's attempt to invoke the exception to the general rule that permits an appeal from an order remanding to an agency where effective review would be foreclosed without an immediate appeal. See, *e.g.*, *Bender* v. *Clark*, 744 F.2d 1424 (10th Cir. 1984). Effective appellate review of petitioner's claims remained available (Pet. App. 18a-19a (footnote omitted)):

> If, after remand, the permits are granted, the City can seek judicial review and if the district court upholds the grant, the City can appeal to this court and both argue that the original permit denial based on New

> Haven's socio-economic developmental interests was proper and present any other challenges arising from the remand proceedings it may have. Thus, review of the socio-economic issue the City now wants to present, is not denied; it is simply delayed.

For this reason, the court of appeals also concluded that the remand order was not appealable under the collateral order doctrine (*id.* at 19a).[5]

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Moreover, any delay in appellate review will not prejudice the City of New Haven because the project it opposes cannot be built until and unless the Corps of Engineers grants a permit. Accordingly, review by this Court is not warranted.

Petitioner apparently contends (Pet. 23-38) that under "a 'practical * * * construction' " (Pet. 29) of the final judgment rule of 28 U.S.C. 1291, the district court's order was appealable where "the resolution of the legal issues in this case are [*sic*] of fundamental importance to the entire metropolitan region" (Pet. 38). In enacting Section 1291,

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[5] The court of appeals also observed that "allowance of an immediate appeal would violate the efficiency concerns behind the policy against piecemeal appeals" (Pet. App. 20a). The court recognized the possibility that an immediate appeal resulting in a reversal of the district court's order would avoid conducting "an unnecessary administrative proceeding" (*id.* at 21a). The court observed (*id.* at 22a), however, that

> reach[ing] out to decide the merits of an [erroneous] interlocutory order just because reversal of an erroneous interlocutory ruling would expedite a particular litigants' case would, in the long run, undermine the final judgment rule and open the door to piecemeal litigation and its concomitant delay, costs, and burdens.

Congress determined that in most cases[6] the concerns of a litigant seeking immediate appellate review are not sufficiently compelling to outweigh the importance of conserving judicial resources and avoiding piecemeal appellate review (with its potential for greatly protracting final resolution of a case). See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 690 (1974); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) (final judgment rule prevents the "debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy").

Accordingly, courts have adhered to the general rule that orders remanding reviewed actions to an administrative agency for further proceedings are not final appealable orders.[7] This rule is sound:

> The case remains alive, and it seems highly unlikely that the order of remand will rest on matters that are genuinely collateral to the merits of the underlying dispute. Effective review of the claim that the original administrative result was not proper can be had after the further proceedings have been completed.

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[6] A substantial safety valve has been provided in 28 U.S.C. 1292(a) and (b).

[7] See, *e.g.*, *Memorial Hospital Sys.* v. *Heckler*, 769 F.2d 1043, 1044 (5th Cir. 1985); *Farr* v. *Heckler*, 729 F.2d 1426, 1427 (11th Cir. 1984) (per curiam); *McCoy* v. *Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc); *Loffland Bros.* v. *Rougeau*, 655 F.2d 1031, 1032 (10th Cir. 1981) (per curiam); *Gilcrist* v. *Schweiker*, 645 F.2d 818, 818-819 (9th Cir. 1981) (per curiam); *Director, Office of Workers' Compensation Programs* v. *Brodka*, 643 F.2d 159, 161-163 (3d Cir. 1981); *Dalto* v. *Richardson*, 434 F.2d 1018, 1019 (2d Cir. 1970) (per curiam), cert. denied, 401 U.S. 979 (1971); *Bohms* v. *Gardner*, 381 F.2d 283, 285 (8th Cir. 1967) (Blackmun, J.), cert. denied, 390 U.S. 964 (1968).

15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3914, at 552 (1st ed. 1976). In this case, therefore, the court of appeals correctly followed settled law in dismissing petitioner's appeal as interlocutory.

To be sure, courts have carved out an exception to the general rule prohibiting immediate appealability. Where effective appellate review would be unavailable after remand, courts have permitted immediate appeals "in order to preserve appellate review of issues that might otherwise escape review" (15 C. Wright, A. Miller & E. Cooper, *supra*, § 3914, at 551 (footnote omitted)); see, *e.g.*, *Bender* v. *Clark*, *supra*. Petitioner's appeal, however, does not qualify for this exception.[8] As the court of appeals correctly pointed out (Pet. App. 17a-18a), the issue petitioner seeks to litigate, whether the Corps of Engineers may consider the City of New Haven's socio-economic interests, remains subject to effective judicial review after the remand for further administrative proceedings.[9]

It is, consequently, premature for petitioner to seek this Court's review (Pet. 39-48) of whether the district court erred in concluding that the Corps of Engineers should not have considered the socio-economic consequences of the proposed project. This Court has no authority to review a question that was not within the jurisdiction of, and was not decided by, the court of appeals. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-743 (1982).

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[8] It is, accordingly, immaterial for present purposes whether, as petitioner seems to contend (Pet. 48-51), the government could have appealed. See Pet. App. 13a-17a. A party retains the option of awaiting a final judgment before seeking appellate review regardless of whether interlocutory review would have been available.

[9] For the same reason, petitioner may not appeal the district court's order under the collateral order doctrine. See *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949) (order must be effectively unreviewable on appeal from a final judgment); Pet. App. 11a-12a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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